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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1242

RICHARD LAWRENCE,

Petitioner,

vs.

JOSEPH WOODS, SHERIFF OF COOK COUNTY, ILLINOIS AND WINSTON M. MOORE, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JOSEPH WOODS, SHERIFF OF COOK COUNTY, ILLINOIS AND WINSTON M. MOORE, WARDEN OF THE COOK COUNTY JAIL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The Petitioner, Richard Lawrence, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 19, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto, *infra,* p. A1. In denying a petition for a writ of habeas corpus no opinion was rendered by the District Court for the Northern District of Illinois. The opinion of the Supreme Court of Illinois

affirming the conviction of Petitioner in the Circuit Court of Cook County, Municipal Department, is reported at 42 Ill. 2d 461, 248 N. E. 2d 71 and is reprinted in full in Appendix B hereto, *infra*, p. A8.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 19, 1970. This Court has jurisdiction to review the judgment by a writ of certiorari under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Whether a decision of the District Court for the Northern District of Illinois holding a penal ordinance of the City of Chicago void on its face in violation of the United States Constitution is binding upon the Supreme Court of Illinois in its review of Petitioner's conviction under the ordinance, the decision of the District Court having involved another, or separate, case and having become final before the Supreme Court of Illinois handed down its decision on Petitioner's appeal.

STATUTES AND ORDINANCES.

Article III, Section 1 of the Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article VI, Section 2 of the United States Constitution:

> This Constitution, and the Laws of the United States

which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Title 28, Section 2241, Power to grant writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to

testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105.

Chapter 11, Section 33 of the Municipal Code of The City of Chicago:

> Any person who shall resist any officer of the police department in the discharge of his duties, or shall in any way interfere with or hinder or prevent him from discharging his duty as such officer, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the custody of any member of the police force to escape or attempt to escape from such custody, or attempt to rescue any person in custody, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

STATEMENT OF THE CASE.*

As alleged in the Petition for a Writ of Habeas Corpus (R. 2), on October 16, 1967, after a trial by jury and a plea of not guilty in the Municipal Court of Chicago, Petitioner was convicted of violating Section 33, Chapter 11 of the Municipal Code of Chicago, the offense being the interfering with the duties of a police officer. The full text of that ordinance (since repealed) is as follows:

> Any person who shall resist any officer of the police department in the discharge of his duties, or shall in any way interfere with or hinder or prevent him from discharging his duty as such officer, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the custody of any member of the police force to escape or attempt to escape from such custody, or attempt to rescue any person in custody, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

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* References to the Record refer to the document numbers of the record as prepared by the District Court clerk.

As a consequence of his conviction, Petitioner was fined $100.00. On December 12, 1967, Petitioner filed an appeal in the Supreme Court of Illinois. While his appeal was pending in that Court, and, therefore, prior to the time his conviction had become final, the District Court for the Northern District of Illinois held that the foregoing ordinance was unconstitutional and void on its face as repugnant to the federal Constitution, *Landry* v. *Daley,* 280 F. Supp. 968. The *Landry* case was appealed to the Court of Appeals and was dismissed *per curiam* on the ground that the appeal had become moot. *Landry* v. *Daley, et al.,* 410 F. 2d 551, 552 (C. A. 7th, 1969).

The Supreme Court of Illinois later affirmed Petitioner's conviction in an opinion which makes no reference to the issue of the effect upon it of the District Court's declaration of invalidity of Section 33. See Appendix B, *infra.*

Thereafter, on August 24, 1969, Petitioner filed an appeal in the Supreme Court of the United States. On November 17, 1969, the Supreme Court dismissed the appeal and, treating the jurisdictional statement as a Petition for a Writ of Certiorari, denied certiorari. Mr. Justice Douglas was of the opinion that probable jurisdiction should have been noted. *Lawrence, et al.* v. *City of Chicago,* 396 U. S. 39.

On January 8, 1970, Petitioner, having refused to pay the $100.00, was taken into the custody of the Respondents and incarcerated in the Cook County Jail to work off the fine at $5.00 per day. On the same day Petitioner filed his petition for a writ of habeas corpus in the District Court (R. 2) and simultaneously filed a motion to be released on his own recognizance or, in the alternative, to fix bail (R. 6).

On January 8, 1970 the District Court denied the motion to release Petitioner on his own recognizance or, in the alternative, to fix bail and the Petition itself was dismissed

on the merits (R. 7). On January 9, 1970, Petitioner filed a notice of appeal (R. 8) and a motion for a certificate or statement under Rule 22(b), Federal Rules of Appellate Procedure (R. 11). A certificate of probable cause for appeal was entered by the District Court on that date (R. 13).

After the notice of appeal was filed in the Court of Appeals the Respondents filed a motion to dismiss the appeal on the ground it had become moot. Petitioner filed responses to these motions and the Court entered an order on February 10, 1970 providing that the motion to dismiss the appeal would be taken with the appeal at the time of oral argument on the merits. The Court of Appeals held that the issues raised by the appeal had not become moot.

The Court of Appeals affirmed the dismissal of the petition for a writ of habeas corpus. The Court conceded there were no federal court decisions dealing directly with the point and went on to observe that there were state appellate courts which have discussed the effect of lower federal court decisions on subsequent cases arising in state courts, although even the state court decisions had split on the question. The Court then elected to follow an Iowa Supreme Court case and a decision of the Supreme Court of New Jersey, *viz., Iowa National Bank* v. *Stewart,* 214 Iowa 1229, 232 N. W. 445, 454 (1930) and *State* v. *Coleman,* 46 N. J. 16, 214 A. 2d 393, 402, 403 (1965), *cert. den.,* 383 U. S. 950 (1966). Not one federal decision was discussed or cited by the Court of Appeals. It simply said that "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts." The explicit holding of the Court was that under the circumstances "the federal court's ruling was not binding on the state appellate tribunal." App. A, *infra,* p. A6.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court of Appeals Involves Important Issues as to the Capacity of a Federal Court to Prevent Municipal Prosecutions From Chilling the Free Exercise of First Amendment Rights.

One hesitates to say the issue presented by this Petition is "novel". It is not. Yet it does appear the precise issue has never been litigated in a federal forum. That the issue is of critical importance to the federal-state judicial partnership cannot be disputed. Petitioner goes one step further: To permit the opinion of the Court of Appeals to stand in the generality and reach of its startling pronouncement about the federal-state judicial relationship will produce nothing but mischievous results throughout the United States where lower federal courts are adjudicating federal rights.

The District Court, in holding Section 11-33 of the Municipal Code of Chicago unconstitutional in *Landry* v. *Daley,* 280 F. Supp. 968 (U. S. D. C. N. D. Ill. 1968), based its holding upon a line of decisions of this Court which say that the doctrine of abstention, requiring federal courts to defer adjudication of challenges to state statutes until they have been authoritatively construed by state courts, is inappropriate where they are justifiably attacked as void on their face. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965); *Zwickler* v. *Koota,* 389 U. S. 241 (1967); *McNeese* v. *Board of Education,* 373 U. S. 668 (1963). The rationale of these cases is that where a statute abridges important constitutional rights, those affected by it "are entitled to be free of the burden of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute

piecemeal, with no likelihood of obviating similar uncertainty for others." *Dombrowski* v. *Pfister,* 380 U. S. at 491. A plaintiff attacking a statute or ordinance regulating first amendment activities for vagueness is entitled to have these federal rights adjudicated in a federal court.

The purpose of this exception to the abstention doctrine would be inadequately served indeed if, after a federal court had adjudicated federal constitutional rights, and had declared a state enactment void on its face, the state was free, by adopting a contrary view of the constitutionality of its statute, to continue to prosecute persons under it.

The chilling effect of such prosecutions upon first amendment rights is not to any significant degree lessened by the hope of eventual vindication in the federal courts. Nor can it be the case that only persons who are plaintiffs in the federal court action, or represented by such plaintiffs, are entitled to claim the benefits of the declaration of unconstitutionality. The federal court has held the regulation to be void on its face on the basis of infirmities which necessarily operate identically on all persons subject to its proscription. To require every potential defendant to seek an injunction from a federal court before claiming immunity from prosecution under a statute already found by that court to be void would impose a burden upon the exercise of first amendment freedoms wholly at odds with the purpose, reflected in *Dombrowski,* of giving those freedoms the "breathing space" they require to survive." Cf. *NAACP* v. *Button,* 371 U. S. 415, 433 (1963).

If the decision of the Court of Appeals stands, effective control of protected activities will be placed in the hands of local officials who have too often exhibited a disdain for federally-protected rights. The singular effect of allowing municipal officials to continue the prosecution of violations of vague, catch-all ordinances similar to Section 11-33 will

be perfidious. The relatively small fines doled out in these cases defies defendants to spend the time and resources necessary to defend their freedom of expression.

In his brief and argument to the Supreme Court of Illinois, as alleged in Petitioner's petition for a writ of habeas corpus in the District Court (R. 2), Petitioner vigorously contended the Supreme Court of Illinois was bound by the decision in *Landry* v. *Daley*. Not only was this issue wholly ignored in its opinion, the Supreme Court of Illinois did not even cite the *Landry* decision as having any precedential value as it wended its way toward sustaining the constitutionality of the ordinance. Instead, the court announced that "[n]o rule of construction requires the ordinance before us to be given an absurd effect, although within its letter, is contrary to its spirit." App. B, *infra*, p. A10, 42 Ill. 2d at 464. This quaint thesis of "spiritual due process" in statutory construction is just the kind of aberration which demands that the federal judiciary—at all levels—maintain primacy when federal courts are construing federally-protected rights.[1]

II.

The Decision of the Court of Appeals Presents an Important Question in the Federal Judiciary as to the Proper Construction of the Supremacy Clause of the Constitution of the United States.

So far as we can ascertain, no similar case has ever been decided by a federal court. The Court of Appeals

1. The failure of the Supreme Court of Illinois even to cite the District Court decision in *Landry* v. *Daley* is ironic in view of the observation of the District Court Judge that he paid "no attention to any district court opinion, especially if it is from the District of Columbia. I pay no attention to any opinion from the Circuit Court of Appeals of the District of Columbia. I have a great respect for the Illinois Supreme Court." Tr. of January 8, 1971, p. 17.

said there were "no federal court decisions dealing directly with the point". The existing authorities on the effect of a federal court holding a local penal law void, upon which the Court of Appeals based its decision without furthere analysis, are limited to scattered and conflicting state court decisions. See: *State* v. *Coleman* and included citations 46 N. J. 16, 214 A. 2d 393 (1965), cert. den., 383 U. S. 950 (1966).

The Court of Appeals also adopted the view that the federal judiciary holds no special position or responsibility in deciding questions of federal law, and, by so doing, has clearly undertaken to make new law in an area of great importance. To achieve its result the Court of Appeals interpreted Article VI of the Constitution in a fashion out of keeping with both the words of the Supremacy clause and the purpose of the lower federal judiciary.

The Constitution's provision for, and the consequent creation of, a lower federal judiciary manifested a reaction to the uniform disregard by the state courts of the central government of the Confederation. With this experience in mind Alexander Hamilton observed in the *Federalist Papers*, No. 81:

> * * * The most discerning cannot foresee how far the prevalency of local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.[1] * * *

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1. *Great Books of the Western World*, American State Papers, Robert M. Hutchins, Editor in Chief, Encyclopaedia Britannica, Inc., vol. 43, p. 240.

The case at bar illustrates that two centuries of political evolution have not wholly mollified this distrust of the state judiciary. The Supreme Court of Illinois wholly ignored the question of the applicability of the District Court's decision in *Landry* v. *Daley*. As alleged in the petition for a writ of habeas corpus, eleven pages of Petitioner's principal brief filed with the highest court of Illinois, and counsel's oral argument, pointedly and vigorously contended that the Supreme Court of Illinois was bound to follow the decision of the District Court (R. 2). The case raised critical questions at the confluence of state and federal powers under the Constitution and one might reasonably have expected the Supreme Court of Illinois to have given it nodding recognition in the course of its opinion. But—not a word!

Article VI, Section 2 of the Constitution reads as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land and the Judges in every State *shall be bound* thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. Article VI, Section 2 (Italics added).

The mischievous consequences of the construction of the Supremacy Clause articulated in the decision of the Court of Appeals are infinite. Doubt has been cast upon the authority of every lower federal court when construing federal rights because, if the state and the lower federal judicial systems are parallel in power, as the Court of Appeals asserts, the power to remedy the abuses of the state judicial systems will reside solely in the Supreme Court of the United States. A juxtaposition of this implication of the lower court's decision with the words of this Court creates a remarkable contrast. In *Douglas* v. *Jeannette*,

319 U. S. 157, 163, which dealt with the problem of interfering with state criminal prosecutions, this Court referred to the power of the federal district courts when it said that an injunction was proper "in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent * * *." In *Zwickler* v. *Koota,* 389 U. S. 241, 254, an action for a declaratory judgment, this Court went further:

> * * * [A] Federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction. . . . It will be the task of the District Court on the remand to decide whether an injunction will be "necessary or appropriate" should appellant's prayer for declaratory relief prevail.

In providing a judicial branch, Article III of the Constitution draws no distinction, other than the appellate relation, between the power of the Supreme Court and the power of the lower federal courts that Congress chooses to create. An analysis based on power, which is the underlying issue, leads to the conclusion that a decision of a lower federal tribunal declaring federal law is, as are the decisions of this Court, imbued with the strength of the Supremacy Clause. As this Court recognized over a century ago:

> The decision of the Courts of the United States within their sphere of action, are as conclusive as the laws of congress made in pursuance of the Constitution. *Mayor and Aldermen of the City of Nashville* v. *Cooper,* 73 U. S. 247, 253 (1868).

Again, this Court spoke in unequivocal terms regarding the primacy of the federal courts in construing the Constitution when, in *Cooper* v. *Aaron,* 358 U. S. 1, 18 (1958), the Court referred to *"the basic principal that the federal judiciary is supreme in the exposition of the law of the*

Constitution, [which] has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." (Italics added.) And, see *England* v. *Louisiana Medical Examiners,* 375 U. S. 411, 415-6 (1963).

The decision of the Court of Appeals encourages every state court to take exception to each decision of a federal court made pursuant to its well-articulated duty to void state laws which curb protected activities. While this Court has recognized "the role of state courts as the final expositor of state law," the Supreme Court of Illinois, has clearly disregarded, as will other state courts, "the primacy of the federal judiciary in deciding questions of federal law". *England* v. *Louisiana State Board of Medical Examiners,* 375 U. S. 411 at 415-416; Cf. *Euge* v. *Smith,* 418 F. 2d 1296 (C. A. 8, 1969).

CONCLUSION.

For the foregoing reasons it is respectfully urged that a writ of certiorari issue to the Court of Appeals for the Seventh Circuit to review its decision of October 19, 1970.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1970 September Session, 1970

No. 18169
United States of America ex rel. Richard Lawrence,
Petitioner-Appellant,
vs.
Joseph I. Woods, Sheriff of Cook County, Illinois, and Winston M. Moore, Warden of the Cook County Jail,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 19, 1970.

Before Swygert, *Chief Judge,* Duffy, *Senior Circuit Judge,* and Cummings, *Circuit Judge.*

Swygert, *Chief Judge.* This is an appeal from a denial of a petition for a writ of habeas corpus filed under the provisions of 28 U. S. C. § 2254. Two questions are presented: (1) whether the case has been mooted, and (2) if not, whether a state appellant tribunal is bound by a prior federal court decision holding a municipal penal ordinance unconstitutional.

The petitioner, Richard Lawrence, was found guilty by

a jury in the Circuit Court of Cook County of interfering with the duties of a police officer in violation of Section 33, Chapter 11 of the Municipal Code of Chicago.[1] As a consequence, petitioner was fined $100.

While petitioner's appeal in the Supreme Court of Illinois was pending the District Court for the Northern District of Illinois, in an unrelated declaratory judgment action, held that the ordinance was unconstitutional and void on its face as repugnant to the federal Constitution. *Landry* v. *Daley,* 280 F. Supp. 968 (1967).[2]

Subsequently, the Supreme Court of Illinois affirmed petitioner's conviction, *Chicago* v. *Lawrence,* 42 Ill. 2d 461, 248 N. E. 2d 71 (1969), without referring to the federal court's prior declaration of invalidity of the ordinance. Thereafter, petitioner sought an appeal in the Supreme Court of the United States. The Court dismissed the appeal and, treating the jurisdictional statement as a statement as a petition for writ of certiorari, denied certiorari. *Lawrence* v. *Chicago,* 396 U. S. 39 (1969).

The case was remanded to the circuit court, and petitioner, having refused to pay the $100 fine, was placed in the custody of the sheriff of Cook County and confined in the House of Correction, there to serve the fine at a rate

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1. Section 33, Chapter 11 of the Municipal Code of Chicago reads:

> Any person who shall resist any officer of the police department in the discharge of his duties, or shall in any way interfere with or hinder or prevent him from discharging his duty as such officer, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the custody of any member of the police force to escape or attempt to escape from such custody, or attempt to rescue any person in custody, shall be fined not less than ten dollars nor more than one hundred dollars for each offense.

2. The ruling was appealed by the City of Chicago; however, the appeal was dismissed because of mootness. 410 F. 2d 551 (7th Cir. 1969).

of $5.00 per day. Following his confinement, petitioner filed a habeas petition in the federal district court. The petition was denied. While an appeal from the denial was pending in this court, petitioner, having served the requisite time in jail, was discharged from custody.

I.

Although the question is not completely free from doubt, petitioner's satisfaction of the penalty assessed against him does not moot the issue raised in the habeas petition. Respondents argue that *Carafas* v. *LaValle,* 391 U. S. 234 (1968), is not controlling, since that case concerned a felony conviction, and that the holding in that case should not be extended to convictions for minor offenses relating to misdemeanors and municipal penal ordinances. In *Carafas* the Supreme Court held that even though a prisoner's sentence expired before an application for habeas corpus had finally been adjudicated, jurisdiction of the application was not terminated. The Court reasoned that because of the " 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' . . . On account of these 'collateral consequences,' the case is not moot." 391 U. S. at 237-38.

In *Sibron* v. *New York,* 392 U. S. 40 (1968), the Supreme Court dealt with the question of mootness in a case concerning a misdemeanor. There the prisoner had been released from custody during the pendency of a direct appeal in the state court. The Supreme Court held that the case was not moot, saying:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences.
>
> * * * * *

> The Court thus acknowledged [in *Pollard* v. *United States*, 352 U. S. 354 (1957)] the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere "possibility" that this will be the case is enough to preserve a criminal case from ending "ignominiously in the limbo of mootness." 392 U. S. at 52, 55.

The Court concluded that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U. S. at 57.

We see no reasan why the question of mootness should be treated any differently in habeas corpus proceedings from direct appeals. Accordingly, the rationale developed in *Carafas* and *Sibron* must be applied in this case.

The respondents maintain that the possible legal consequences flowing from a conviction of a municipal ordinance are nonexistent. We are unable to agree. The State of Illinois recently enacted a statute permitting anyone who has been charged with an ordinance violation or a misdemeanor and who is subsequently acquitted or released without conviction to petition to have the record of his arrest expunged if he has never previously been convicted of any criminal offense or ordinance violation.[3] This statute itself is sufficient recognition of the potential "disabilities or burdens" which may flow from such a conviction. Since the statute applies only to those who have not previously been convicted of criminal offenses, including municipal ordinance violations, the denial of the statute's benefits is a consequence and disability suffered by those who have a prior record of a municipal ordinance violation. Petitioner's interest in voiding his present condition so that he might take advantage of this Illinois procedure is itself sufficient to render a finding of mootness improper.

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3. Ill. Rev. Stat., Ch. 38, § 206-5.

II.

The sole reason assigned by petitioner for the issuance of a writ is that the Supreme Court of Illinois failed to follow, under the supremacy clause, the federal district court's ruling in *Landry* v. *Daley* that the interference ordinance is constitutionally void on its face.

Although we have found no federal court decisions dealing directly with the point, state appellate courts on occasion have discussed the effect of lower federal court decisions on subsequent cases arising in state courts. For example, the Supreme Court of New Jersey in *State* v. *Coleman,* 46 N. J. 16, 214, A. 2d 393, 402, 403 (1965), declining to follow an earlier holding of the Third Circuit in a different case which involved an identical question of law, said that although it recognized that the United States Supreme Court "is the final arbiter on all questions of federal constitutional law," . . . [the court of appeals holding] "is not binding on us in other cases which came before us in the exercise of our acknowledged State jurisdiction." The Court added: "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court." The court then cited a number of decisions from various state jurisdictions supporting this principle. Included among them is *Iowa Nat. Bank* v. *Stewart,* 214 Iowa 1229, 232 N. W. 445, 454 (1930). There the Supreme Court of Iowa stated:

> The federal Circuit Courts of Appeals and, in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts. Final-

> ity of determination in respect to the laws of the United States rests in the Supreme Court of the United States. Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts.

Although some tribunals have held that decisions of lower federal courts are conclusive on state courts, *e.g., Handy* v. *Goodyear Tire & Rubber Co.,* 230 Ala. 211, 160 So. 530 (1935), *Kuchenmeister* v. *Los Angeles & S. L. R.,* 52 Utah 116, 172 Pac. 725 (1918), we are persuaded that the view expressed by the New Jersey and Iowa appellate courts is the correct one.

The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

Of course in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on all other courts, subject only to the appellate process. But that is not the situation here. The district court's declaration that the interference ordinance is unconstitutional was made in an unrelated case and at a time when petitioner's appeal from his conviction was pending in the Supreme Court of Illinois. In these circumstances, we hold that the federal court's ruling was not binding on the state appellate tribunal.

The order of the district court denying the writ is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 41216—Agenda 28—May 28, 1969

THE CITY OF CHICAGO, Appellee, *vs.* RICHARD LAWRENCE *et al.*, Appellants.

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

After trial by jury in the circuit court of Cook County, Richard Lawrence and James Orange were found guilty of interfering with a police officer in the performance of his duties. Each was fined $100. Claiming violations of constitutional rights as well as errors at the trial, they appeal directly to this court.

The record discloses that on November 12, 1966, the Chicago Police Department was notified that a large group intended to stage a "demonstration" outside the home of officer Burleigh Ginkle, a member of the police department. The plans was to congregate at 2:00 P.M. the next day and proceed in automobiles along 63rd Street to a designated parking area from which they would then march to Officer Ginkle's residence. Sergeant O'Malley, a 20-year member of the police department, was given orders to protect Officer Ginkle and his family from undue harassment by these people, and an assistant corporation counsel of the city was assigned to act as a legal advisor to the police. Officer Ginkle had requested that he and his family be given such protection.

On the day of the anticipated demonstration the defendants and a third individual appeared at the officer's home.

They walked up on the porch of the house and began knocking on the door. No one opened it. Sergeant O'Malley and the legal advisor were parked across the street, and when they saw what was going on they walked over and told defendant that they had been assigned to keep demonstrators from disturbing Officer Ginkle and his family, and that defendants were not to pound on the door or ring the bell. The three persons came down the steps and Sergeant O'Malley and his companion began to walk back to the squad car. Before they reached it, however, the defendants and their companion went back up the steps and resumed their pounding on the door. Once again Officer O'Malley went to them. He warned them that if they continued their behavior he would have to place them under arrest. The third intruder went to the corner, where the group was assembled, but the defendants once again began pounding on the door. Sergeant O'Malley thereupon walked back up the steps of the house, escorted defendants away and told them they were under arrest.

The ordinance under which the defendants were charged provides that "Any person who shall resist any officer of the police department in the discharge of his duties, or shall in any way interfere with or hinder or prevent him from discharging his duty as such officer, or shall offer or endeavor to do so, and whoever shall in any manner assist any person in the custody of any member of the police force to escape or attempt to escape from such custody, or attempt to rescue any person in custody, shall be fined not less than ten dollars nor more than one hundred dollars for each offense." It is contended that the provisions are invalid for vagueness and for failing to expressly include scienter as an element of the offense. Defendants object that terms like "interfere with" are not defined, and hypothetical situations are pictured in which they suggest a person could violate the ordinance by engaging in "constitutionally-

protected'' conduct. They urge that the ordinance must fall for not, in terms, requiring that the offense be commuted ''knowingly'' and with knowledge that the officer was engaged in the performance of his duties.

As for the vagueness objection it is true that conduct prohibited by ordinance or statute must be described in terms definite enough to serve as a guide to those to whom it applies. But ''interfere with'' and ''hinder'' are not under all circumstances terms too indefinite to be applied. An ordinance may describe conduct by their use where the meaning is clear enough to people contemplating such behavior, the test being whether they convey sufficient definite warning as to proscribe conduct when measured by common understanding and practices. (*Cf. Jaffe* v. *Cruttenden,* 412 Ill. 606.) We do not think that under a reasonable construction the ordinance in the case at bar can be said to be unconstitutionally vague and indefinite. An ordinance or statute must be read in a sensible way, without giving necessarily general terms like ''interference'' such a literal application as would lead to undue restrictions on speech or some other constitutionally protected conduct. No rule of construction requires the ordinance before us to be given an absurd effect which, although within its letter, is contrary to its spirit.

Nor is it necessary to consider at length the objection that the ordinance does not in terms require the offense to have been committed ''knowingly.'' Even if a construction could be given which would render it void because of such an absence, defendants are in no position to raise the question. It is an established rule that courts will not entertain objections to an allegedly unconstitutional feature where the objecting party is not in any way aggrieved thereby. One who would attack an ordinance or statute as unconstitutional must bring himself within the class as to whom the law is unconstitutional. (*City of Elmhurst* v. *Buettgen,* 394

Ill. 248; *Liberty National Bank of Chicago* v. *Collins,* 388 Ill. 549, 559.) In the case at bar there was nothing inadvertent or unknowing about defendants' interference. It is clear that they acted with full scienter, the officer having in fact advised them of his assignment when he first spoke to them. Nevertheless they disregarded his explanations and went back to their pounding on the door. Their conduct was a plain interference with the officer's efforts to maintain order at the scene of the demonstration. They deliberately ignored his repeated directions, distracting his attention from the crowd on the corner and making it necessary for him to return and physically escort them from the premises. They are not in a position to raise a constitutional question based on lack of scienter.

Defendants argue next that the complaints failed to provide them with adequate notice of the charges against them. There is no merit in the contention. Examination of the complaints discloses the date and place of the offense, the name of the complainant police officer, the charge that they did then and there "interfere with him in the performance of his duties", and the chapter and section of the municipal code which was allegedly violated. This was adequate. Moreover there is no question that the defendants were aware of the facts which prompted their arrest. Indeed there had been a prior trial of these same defendants on the same charges, in which the court had declared a mistrial. And in any event the defendants could have moved for more specific statements of the charges if they felt that the complaints were insufficient in that respect. (See *People* v. *Stout,* 41 Ill. 2d 292, 293.) Under circumstances such as these there is no basis for claiming on review that the complaints are not specific enough. *City of Chicago* v. *Joyce,* 38 Ill. 2d 368.

Defendants next claim they were denied the right to take a discovery deposition of Sergeant O'Malley. The record

contains a notice for the taking of such a deposition, which defendants say was served on the city, and a petition was filed by the latter to deny discovery by deposition. As the city points out, however, the record contains no ruling or order granting or denying the petition. The only indication that a ruling was made is in certain recitations by defendants to the effect that the petition was allowed. The recitations appear in a motion entitled "DEFENDANTS' MOTION FOR POSTPONEMENT OF TRIAL OR, IN THE ALTERNATIVE, FOR IDENTIFICATION OF RULE OF LAW FOR IMMEDIATE APPEAL UNDER SUPREME COURT RULE 308(a)." Orders appear denying these motions. Defendants now seek to have this court determine generally whether "municipal ordinance prosecutions" are governed by the Civil Practice Act and by the rules of this court applicable to civil proceedings. We have recently pointed out that a prosecution to recover a penalty for violation of a municipal ordinance is not a criminal proceeding (*People* v. *Stout,* 41 Ill. 2d 292.) It is civil in form, although quasi-criminal in character, and ordinarily is termed a civil action rather than a criminal prosecution. (*Village of Maywood* v. *Houston,* 10 Ill. 2d 117, 119.) As we observed in the *Houston* case, however, "problems in this area cannot be solved by a mere labeling process."

In any event this court cannot decide the abstract question sought to be presented here. We cannot infer what ruling was made, if any, on the city's petition, nor do the grounds appear upon which the court may have acted. Even if it be assumed that discovery depositions may be taken in proceedings of this nature, and that the court granted the city's petition to deny, it can hardly be doubted that grounds might still have existed which would warrant the court's action. In the absence of some showing that appropriate steps were taken to compel the appearance of deponent and that the court refused discovery on the grounds that such procedure is not available, we must presume in

support of the judgment that some valid ground in fact existed. (*Cf. Mullen* v. *People ex rel. Wyatt,* 138 Ill. 606.) In view of the condition of this record no issue is presented which we can decide.

It is claimed that remarks by the assistant corporation counsel in his closing argument to the jury were irrelevant and prejudicial. The first statement complained of was made in reply to comments in defendants' argument on the absence of Officer Ginkle from the courtroom. The city's counsel merely remarked in explanation that the officer's testimony would have added nothing to the case, since he was inside the house when the acts occurred, that he was on duty at the time of the trial, and that "why should we waste your time and the court's time to bring in testimony that would merely be duplicitous (*sic*) of what has gone on before?" The contention is that by the quoted statement counsel was intimating that had Officer Ginkle been called as a witness he would have supported the city's case, and that there is nothing in the record to indicate how he would have testified. The comment was not prejudicial. It was perfectly proper as a response to defense counsel's queries in his argument as to why the officer was not produced at the trial.

The prosecutor also remarked, after referring to members of the police department and their efforts to perform their duties, that "Believe me, it is not an accident that we have not had any riots in this city this summer. We have not had them. We have had them in Newark, in New York * * *." At this point defense counsel objected. The court sustained the objection and directed the jury to disregard the statements. Defendants now insist that they were entitled to have the court grant a mistrial in spite of the ruling on their objection and the direction to disregard. We cannot agree. While the remark may not have been proper, there being no evidence that the demonstrators were ap-

proaching a riot situation, it was not sufficiently prejudicial to call for reversal under the circumstances here. Where it appears that improper remarks do not constitute a material factor in the conviction or that they are of such a minor character that prejudice is not their probable result, the verdict will not be disturbed. (*People* v. *Swets,* 24 Ill. 2d 418.) This is the case here.

Our review of this record satisfies us that the evidence amply sustains the verdict and that defendants received an eminently fair trial. The judgments of the circuit court are affirmed.

Judgments affirmed.

Supreme Court of the United States

October Term, 1949

No. 124

RICHARD LAWRENCE,

Petitioner,

vs.

JOSEPH L. WOODS, Sheriff of Cook County, Illinois, and WINSTON M. MOORE, Warden of the Cook County Jail,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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State's Attorney of Cook County,
ROBERT A. [illegible],
[illegible] A. [illegible],
Assistants State's Attorney,
Counsel for Respondents.

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IN THE

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OCTOBER TERM, 1970

No. ——

RICHARD LAWRENCE,

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JOSEPH I. WOODS, Sheriff of Cook County, Illinois, and WINSTON M. MOORE, Warden of the Cook County Jail,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court for the Northern District of Illinois did not render a written opinion in dismissing the petition for a writ of habeas corpus. The opinion of the Court of Appeals for the Seventh Circuit (App. A. of the Petition) is reported at 432 F. 2d 1072 (C.A. 7th Cir. 1970). The opinion of the Supreme Court of Illinois (App. B. of the Petition) affirming the Petitioner's conviction in the Circuit Court of Cook County, Municipal Division is reported at 42 Ill. 2d 461, 248 N.E. 2d 71 (1969).

JURISDICTION

The Petition adequately sets forth the relevant jurisdictional requirements.

QUESTION PRESENTED

Whether the "Supremacy Clause" (Art. VI, Sec. 2, United States Constitution) requires that the Supreme Court of the State of Illinois, in deciding the constitutionality of a Chicago penal ordinance, must follow the opinion of the lower Federal Court delivered in a different case dealing with the same penal ordinance, where the lower Federal Court decision is rendered prior to the decision of the Illinois Supreme Court.

STATUTES AND ORDINANCES INVOLVED

The pertinent provisions of the United States Constitution (Art. III, Sec. 1; Art. VI, Sec. 2), the United States Code (Title 28, § 2241), and Chicago Municipal Code (Ch. 11, § 33) are set forth in the Petition at pp. 2-4.

STATEMENT OF THE CASE

Richard Lawrence, hereinafter referred to as petitioner, comes before this court seeking a Writ of Certiorari to the Court of Appeals for the Seventh Circuit. He urges this court to review the judgment of the Court of Appeals affirming the District Court's dismissal of his petition for a Writ of Habeas Corpus.

On October 16, 1967, petitioner was found guilty of interference with a police officer in the performance of his duty by a jury in the Municipal Court of Chicago in violation of Chapter 11, Section 33 of the Municipal Code of the City of Chicago. The petitioner was fined $100.00 for this offense.

The petitioner appealed this conviction directly to the Illinois Supreme Court. However, prior to the Illinois Supreme Court's hearing of that appeal, the district court for the Northern District of Illinois struck down Chapter 11, Section 33 of the Chicago Municipal Code in the case of *Landry* v. *Daley,* 280 F. Sup. 968 (D.C. N.D. Illinois, 1968), holding that the ordinance was unconstitutional on its face. The appeal taken by defendant Daley to the Court of Appeals was dismissed *per curiam* for mootness. *Landry* v. *Daley,* 410 F. 2d 551 (C.A. 7th Cir., 1969).

The Illinois Supreme Court affirmed the conviction of petitioner in an opinion discussing the merits of the questioned ordinances. *City of Chicago* v. *Lawrence,* 42 Ill. 2d 461, 248 N.E. 2d 71 (1969). In affirming petitioner's conviction, the Illinois Supreme Court did not refer to the Federal District Courts prior declaration of the invalidity of the ordinance. Petitioner, therefore, sought an appeal to this court. His appeal was dismissed and this court, treating the jurisdictional statement as a peti-

tion for a Write of Certiorari, denied certiorari. *Lawrence* v. *Chicago,* 396 U.S. 39, 24 L. Ed. 2d 208 (1969).

On January 8, 1970, the petitioner appeared before the presiding judge of the First Municipal District of the Circuit Court of Cook County upon the mandate of affirmance by the Illinois Supreme Court, and upon his refusal to pay the $100.00 fine, the sentence imposed upon his conviction, he was remanded to the custody of the Sheriff of Cook County to be placed in the House of Correction there to serve the fine. Following his confinement, petitioner filed a habeas corpus petition in the Federal District Court which was dismissed on the merits (R. 7, July 8, 1970). On January 9, 1970, petitioner filed notice of appeal (R. 8). While the appeal from the dismissal of the habeas corpus petition was pending in the Court of Appeals, the petitioner, having served the requisite time in jail, was discharged from custody.

Petitioner's appeal presented two issues for decision by the Court of Appeals; First, whether the cause was moot; secondly, whether the Illinois Supreme Court was bound by the District Court's prior adjudication in *Landry* v. *Daley,* 280 F. Supp. 968 (D.C. N.D. Ill. (1968)).

The Court of Appeals for the Seventh Circuit after deciding that the case was not moot, held that the Illinois Supreme Court was not bound by the District Court's prior adjudication in *Landry,* supra. *Lawrence* v. *Woods,* 432 F. 2d 1072 (C.A. 7th Cir. 1970). Petitioner urges this court to review that holding.

ARGUMENT

The substantive issue decided by the Court of Appeals for the Seventh Circuit, and upon which the petitioner here seeks review, was whether the Supreme Court of Illinois was bound by a decision in a different case dealing with the same statute delivered by the Federal District Court in *Landry* v. *Daley,* 280 F.Sup. 968 (D.C. N.D. Ill. 1968).

The Court of Appeals, in an opinion authored by Chief Judge Swygert, held unanimously that the precedent set by an unreviewed lower Federal Court decision is at best persuasive and certainly not binding on State Appellate tribunals. The court below analyzed state court opinions on the issue presented, noting that there were no federal court decisions on the issue; and further analyzed the issue in terms of appellate jurisdiction. The court stated that since the lower federal courts have no power to review State Supreme Court opinions, therefore, precedent set by a lower Federal Court is not binding on state courts in cases of this type.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The crux of the issue presented to the Court below developed upon the precedental value of a lower Federal Court decision. Petitioner sought to invest a lower Federal court decision with all the weight and authority of a decision of this court. Clearly, a decision of a lower Federal Court, while it may be persuasive on questions arising in other similar fact situations, must be read in light of the fact that the decision is subject to review, restructuring and amplification at both the Circuit Court

of Appeals level and at the Supreme Court level. Indeed the fragility of the specific district court opinion in *Landry* v. *Daley,* supra, becomes apparent upon a study of the subsequent developments in that complex series of litigation, beginning with the original district court opinion at 280 F. Sup. 968, and culminating in the final disposal of those issues by this court's opinion in *Boyle* v. *Landry,* 39 L.W. 4207 (Docket No. 4, February 23, 1971). The petitioner, however, was misled by the illusion of finality in which a lower Federal Distirct Court opinion is clothed. In his arguments before the court below he has attempted to extend the supremacy clause of the United States Constitution (Art. VI, Sec. 2) to include what may be accurately described as a contingent adjudication, since the decision is subject to review at two appellate levels before it becomes clothed with any hint of finality. Realizing this, the court below relied on the case of *Iowa National Bank* v. *Stewart,* 214 Iowa 1229, 235 N.W. 445, 454 (1930) where the Iowa Supreme Court stated:

> "The federal Circuit Courts of Appeals and, in respect to federal law, the state courts of last resort are subject to the supervisory jurisdiction of the Supreme Court of the United States. They are, however, as to the laws of the United States, co-ordinate courts. Finality of determination in respect to the laws of the United States rests in the Supreme Court of the United States. Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts."

It has long been established that this court alone has appellate jurisdiction over the highest state tribunals.

Herndon v. *Georgia*, 295 U.S. 441 (1935); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 4 L. Ed. 97 (1816). Since any rational analysis of the value of a federal district court decision precedent must look towards the finality of the pronouncement, it would appear that State courts and lower federal courts occupy the same parallel position because both are subject to the reviewing authority of this court. The court below cites with approval the language of the Supreme Court of New Jersey in *State* v. *Coleman*, 46 N.J. 16, 214 A. 2d 393, 402, 403 (1965). In discussing the affect of lower federal court decisions on subsequent cases arising in state courts the New Jersey Court stated:

> "In passing on federal constitutional questions, the State courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy, for both sets of courts are governed by the same reviewing authority of the Supreme Court."

Clearly, the aforementioned state court decisions are well reasoned both in law and in reality. In deciding the issue now before this court in favor of the respondent the court below merely recognized the long existing reality of the relationship between state courts and lower federal courts as being one of parallelism but not paramountcy.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT GIVE RISE TO ANY IMPORTANT FEDERAL QUESTION.

The petitioner contends that the decision of the court below operates to hamper the federal district courts in the performance of their duty as arbiters of federal con-

stitutional questions. Relying on *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); and *McNeese* v. *Board of Education,* 373 U.S. 668 (1963), the petition contends that those affected by allegedly unconstitutional statutes "are entitled to be free of the burden of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal with no liklihood of obviating similar uncertainty for others" (*Dombrowski* v. *Pfister,* 380 U.S. at 461). While this may be the case, the issue presented is not whether declaratory or injunctive relief would be appropriate in a given situation, but rather, whether a lower federal court decision delivered prior to a state Supreme Court decision should bind the state court. The petitioner's argument that the decision of the court below will hamper district courts in protecting the interests of those who have sought a declaration as their rights ignores the line of cases recently decided by this court. See *Younger* v. *Harris,* 39 L.W. 4201 (Docket No. 2 February 23, 1971); *Boyle* v. *Landry,* 39 L.W. 4207 (Docket No. 4, February 23, 1971); *Samuels* v. *Mackell,* 39 L.W. 4211 (Docket No. 7-9, February 23, 1971), *Perez* v. *Ledesma,* 39 L.W. ——, (Docket No. 60, February 23, 1971). These cases have set forth with as much precision as possible the situations in which a district court may properly bring into play its equitable power to enjoin state prosecutions under statutes and ordinances which they declare unconstitutional. Interference by the lower federal courts in state affairs beyond the boundary delineated by these cases has been severely criticized by this court as being contrary to the concept of federalism under which this nation has long endured. The decision of the court below leaves unimpaired the equitable powers of Federal District Courts to enforce their judgments

in situations where the aforementioned line of cases deem it appropriate.

Furthermore, the Illinois Supreme Court in the recent case of *People* v. *Stansberry,* —— Ill. 2d ——, (Docket Nos. 40386, 42521, 43126, consolidated, 1970) (Respondent's Appendix A) held in a clearly reasoned decision that it will not consider itself bound by a lower federal court decision until such time as this court has seen fit to review the federal court's decision. *Stansberry* dealt with the issue of whether a defendant was entitled to inquire behind a search warrant and the affidavit supporting it. Prior to the Illinois Supreme Court's decision in *Stansberry,* the Court of Appeals had held that search warrant affidavits issued under a false or fictitious name were void (*United States ex rel. Pugh* v. *Pate,* 401 F. 2d 6 (7th Cir. 1968). In deciding that it would not be bound by the lower federal court's decision, the Illinois Supreme Court stated:

> "We find the question to be an illusive one though it is discussed generally in an annotation in 147 A.L.R. 857 and in 21 C.J.S. Courts, Sec. 206. These references indicate lack of unanimity among the several States with the majority favoring the rule that such decisions have no binding effect until the issue is considered by and determined by the Supreme Court. This would appear to be the most logical conclusion, for oftentimes there is a conflict between decisions of the various Federal Courts on constitutional matters, and until determined by the United States Supreme Court there can be no definitive ruling by which a state court can be bound." (*People* v. *Stansberry,* Resp.App. A)

The *Stansberry* decision taken together with the decision of the court below shows that there is no conflict between the state and federal courts in the Seventh Cir-

cuit on the issue now before the court. Given the common-sense, well reasoned decision of the court below, the respondent contends that review by this court of the instant cause is unwarranted.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant petition for a Writ of Certiorari should be denied.

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APPENDIX A

Docket Nos. 40386, 42521, 43126 cons.—Agenda 17—September, 1970.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. CHARLES STANSBERRY, Appellant.—SAME, Appellee, vs. JAMES HARVEY, Appellant.—SAME, Appellee, vs. LJNNIE HATCH, Appellant.

Mr. JUSTICE KLUCZYNSKI delivered the opinion of the court:

On separately docketed direct appeals to this court, these cases have been consolidated because there is a similarity of facts and similar application of a legal principle. Defendants Charles Stansberry and Lonnie Hatch were found guilty in the circuit court of Cook County of the crime of illegal possession of heroin, a narcotic drug. They were convicted in a bench trial and sentenced to the penitentiary for terms of not less than two nor more than four years, and not less than two nor more than two years and a day respectively. After a jury trial, defendant James Harvey was found guilty in the circuit court of Cook County of the crime of possession of marijuana, a narcotic drug, and sentenced to the penitentiary for a term of not less than two nor more than five years.

Each defendant contends that his constitutional rights were violated by the refusal of the trial court to quash the search warrants and suppress the incriminating evidence produced by the execution of said warrants. It is argued that the allegations of the complaints which led to the finding of probable cause by a judicial officer in

the first instance were false and fraudulent and that they should have a right to controvert those allegations. In addition, each defendant contends that a warrant issued pursuant to an affidavit signed with a false or fictitious name is void.

We have recently had occasion to consider the first question posed and have held that there is no constitutional or statutory right to controvert the matters decuared under oath which occasioned the finding of probable cause and the issuance of a search warrant by a judicial officer. (*People* v. *Mitchell,* 45 Ill. 2d 148; *People* v. *Bak,* 45 Ill. 2d 140, *cert.* denied, October 26, 1970, 91 S. Ct. 117.) We have likewise been urged, as we are in these cases, to reconsider the *Bak-Mitchell* decisions and we have declined to do so. (*People* v. *Nakon,* 46 Ill. 2d 561.) Once again we find no reason to change our opinion and, based on the reasoning of the above cases, we find that the trial court properly refused to permit defendants to challenge the truth of the affidavits upon which the finding of probable cause was based.

In support of their contention that the search warrants were void, defendants cite *United States ex rel. Pugh* v. *Pate* (7th cir. 1968), 401 F. 2d 6, holding that a warrant issued pursuant to an affidavit signed with a false or fictitious name is void. Contrary to this finding we have previously held that the use of a fictitious name by an affiant to a search warrant does not constitute a violation of a defendant's constitutional rights. (*People* v. *Mack,* 12 Ill. 2d 151; *People* v. *Smth,* 40 Ill. 2d 501.) The question thus presented is whether the *Pugh* case has any binding effect on this court when the issue has not been passed on by the United States Supreme Court. We find the question to be an elusive one though it is discussed generally in an anno-

tation in 147 A.L.R. 857 and in 21 C.J.S. Courts, sec. 206. These references indicate a lack of unanimity among the several States with the majority favoring the rule that such decisions should have no binding effect until the issue is considered and determined by the Supreme Court. This would appear to be the most logical conclusion, for oftentimes there is a conflict between decisions of the various Federal courts on constitutional matters and until finally determined by the United States Supreme Court there can be no definitive ruling by which a State court can be bound. (See: *Lawrence* v. *Woods* (7th cir.), —— F. 2d ——, (8 Cr. Law Rptr. 2084.) For instance, on the question first posed in this opinion some lower Federal courts have held that a defendant is not entitled to inquire behind a search warrant and the affidavit supporting it, (*Kenny* v. *Unted States* (D.C. cir.), 157 F. 2d 442; *United States* v. *Gianaris* (D.C.D.C.) 25 F.R.D. 194) whereas the contrary view is expressed in *United States* v. *Suarez* (2d cir.), 380 F. 2d 713; *United States* v. *Gillette* (2d cir.), 383 F. 2d 843; *United States* v. *Roth* (7th cir.), 391 F. 2d 507. And the United States Supreme Court has not yet ruled upon the question. (*Rugendorf* v. *United States,* 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825.) Under such circumstances decisions of the lower Federal courts can be held to be no more than persuasive and certainly not binding on State courts.

Following our previous decisions in *People* v. *Mack,* 12 Ill. 2d 151, and *People* v. *Smith,* 40 Ill. 2d 501, we reaffirm that the use of a fictitious name by an affiant to a search warrant does not constitute an abridgement of constitutional rights. *People* v. *O'Kiersey,* 46 Ill. 2d 198.

We shall now discuss the additional points raised by defendants Hatch and Harvey.

Hatch contends that the police officers did not file and docket the search warrant until after it was served and he was arrested. This procedure admittedly was in compliance with section 108—4 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 108—4) which provides in part that a complain upon which a warrant is issued need not be filed with the clerk until the warrant has been executed or has been returned "not executed." He argues that the statute itself is unconstitutional because it permits and "encourages uncontrolled and unsupervised police harassment and intrusion upon a citizen in his home," and affords o remedy to the innocent in whose home nothing incriminating is found. Such argument ignores the fact that before a warrant is issued a written complaint must be submitted to a judicial officer, as in this case, which states facts sufficient to show probable cause and particularly describes the place or person to be searched and the items to be seized. The purpose of the statute questioned is as stated in the Committee Comments, "* * * to enhance the law enforcement process by providing for a lack of public knowledge concerning the warrant until it has been executed." (S.H.A. ch. 38, § 108—4.) We find no constitutional objection to exercising such precautions as may be necessary to forestall the possibility of one obtaining foreknowledge of an impending search. See: *People* v. *Price,* 46 Ill. 2d 209.

Harvey contends that the police wrongfully delayed one day after issuance of the warrant before executing it in order to inculpate him for the offense, that a statement of his was improperly admitted into evidence when admittedly he had not previously been warned of his constitutional rights, that the trial court erred in not forcing the State to produce the affiant on the complaint for a search warrant

at the trial, that he was not proved guilty beyond a reasonable doubt, and that his sentence was excessive.

The search warrant was issued on October 28, 1967, and provided for a search of the person and the premises at the headquarters of the Afro-American Student Association, located at 3856 S. Parkway in Chicago. It was not served until the next day, October 29, because the police had learned that Harvey was not present at the Association office but that he was expected the next day. When the police did approach the office they were met by a young lady, and upon identifying themselves, they were admitted. According to the police warrant was presented to Harvey and he read it in the presence of four other men. The officers, accompanied by Harvey, searched the premises consisting of three small rooms. In one of the rooms they found boxes and bags of old, dirty clothes and shoes and on the wall, hanging on hangers, a trench coat and several clean shirts. They testified that they asked Harvey whether the trench coat and clean shirts were his and he stated that they were. He was also asked about the clothing in the boxes on the floor and he said that it belonged to him too. The police then searched all the clothing and in the pocket of the trench coat found five small brown envelopes containing the marijuana in question. Upon showing Harvey the marijuana they placed him under arrest and took him and the other individuals present to the police station.

Harvey testified that he was a member of the Association and that the clothing in question was being collected by the Association members in a clothing and fund drive. He stated that when the officers entered they identified themselves, asked everyone to have a seat, and presented him with the warrant which he read. He was not told he

was under arrest but he said he thought he was treated as if he were. He was not told that he was free to go. He denied stating that the trench coat belonged to him and stated it was a small lady's coat which had been collected in the drive. He stated that before the police said they found the marijuana he had responded to their questions about the clothes but only to the effect that he was responsible for all of them as co-ordinator of the drive.

The officers testified that the coat looked to be about Harvey's size but it was not inventoried and its whereabouts at the time of trial was unknown, and that Harvey did not wear a coat to the police station. Pictures were introduced showing him without a coat at the station and the others with different types of outer apparel. Harvey stated that he wore a coat to the station but had left it in his cell when the pictures were taken.

From these facts we find that the execution of the search warrant was in compliance with section 108—6 of the Code of Criminal Procedure (Ill. Rev. Stat., 1969, ch. 38, par. 108—6) which provides that warrants shall be executed within 96 hours from the time of issuance. The warrant called for a search of the person as well as a search of the premises, so that delay until the officers were sure Harvey would be present, was justified.

Defendant Harvey contends that he was not advised of his constitutional rights before he made incriminating statements as required by *Miranda* y. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. The question is whether the statement of Harvey relative to the trench coat arose out of custodial interrogation. "The *sine qua non* for invoking the *Miranda* rule is that the interrogation be focused on the accused while he is 'taken into custody or otherwise deprived of his freedom of action [by authori-

ties] in any significant way.' 384 U.S. ata 444, 16 L. Ed. 2d at 706, 86 S. Ct. 1602." (*People* v. *Fischetti,* Docket No. 43019.) Here upon entry, the police, according to Harvey's own testimony, asked those present to be seated, presented the warrant to him, and then after he had read it and before conducting the search they made the normal and ordinary inquiry concerning the clothes which were scattered about the office. Under these circumstances he was not then deprived of his freedom of action in any significant way. The compulsion and danger of intimidation that the *Miranda* rule was designed to eliminate was clearly not present. Accordingly the trial court did not err in admitting the answer of defendant Harvey into evidence.

Harvey next contends that the affiant in the complaint for the search warrant should have been made available to him as his witness at the trial on the merits, as the witness might have been able to exculpate him. He cites *Roviaro* v. *United States,* 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623, and a number of other cases to the effect that fundamental fairness demanded the presence of affiant at the trial. But unlike the facts in *Roviaro,* the affiant here merely appeared before the judge who issued the search warrant. He was not present at the time the warrant was served nor at Harvey's arrest. Whether he would have been able to identify Harvey as the individual he described in his complaint would relate only to the question of probable cause for the issuance of the search warrant and would have had no bearing on guilt or innocence of the crime charged. Under such circumstances we have frequently held that *Roviaro* is not applicable and that it is not error to deny the production of such a witness where his testimony would not be relevant. *People* v. *Mack,* 12 Ill. 2d 151; *People* v. *Williams,* 38 Ill. 2d 150; *People* v. *Connic,* 34 Ill. 2d 353.

Finally, defendant Harvey contends that he was not proved guilty beyond a reasonable doubt and that his sentence was excessive. After a careful review of the evidence, we find it fully sufficient to support the jury's verdict and not, as he contends, so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of guilt warranting our interference on review. (*People* v. *Mack,* 12 Ill. 2d 151.) Likewise, we find no abuse of discretion on the part of the trial court on the imposition of sentence. Defendant Harvey was afforded a fair and complete hearing in aggravation and mitigation and his punishment was well within the statutory limits. Under such circumstances the trial court was in a far superior position than we to make a sound determination concerning the punishment to be imposed. *People* v. *Taylor,* 33 Ill. 2d 417.

For the reasons stated the judgments of the circuit court of Cook County in each of the cases here reviewed, People v. Stansberry, People v. Hatch, and People v. Harvey, are hereby affirmed.

Judgments affirmed.